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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)

Broadcast Signal Carriage Issues)

MM Docket No. 92-259

COMMENTS OF DIRECTV, INC.

DirecTv, Inc. ("DirecTv") hereby responds to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 92-499, released November 19, 1992 (the "NPRM"), concerning implementation of the must-carry and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. ____ (1992) (the "1992 Cable Act").

I. INTRODUCTION

DirecTv is a wholly-owned subsidiary of Hughes Communications, Inc., parent company of Hughes Communications Galaxy, Inc. ("HCG"), a Commission licensee in both the fixed satellite ("FSS") and the direct broadcast satellite ("DBS") services. While HCG has an established record of service in the FSS area, DirecTv will be launching the first true DBS service in the United States -- that is, provision of a multichannel video programming service via satellite operating in the DBS band at 12/17 GHz. With the capacity to provide over a hundred channels of video programming to

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households throughout the contiguous United States, DirecTv expects to enter the video market in early 1994 as an alternative to cable television and other localized video delivery systems.

In its FSS operations, HCG provides satellite services primarily through transponder sales and long-term leases of capacity on the Galaxy and SBS satellites operating in the C and Ku bands. Many of HCG's customers are video programmers who use HCG capacity for transmission of video programs to cable systems. In HCG's DBS operations, DirecTv will market the first multi-channel video programming service using the DBS frequency band directly to viewers. DirecTv expects to sell some transponder capacity on the DBS satellites on a "wholesale" basis to programmer-customers, but for the most part DirecTv will be directly responsible for selecting and distributing the programming carried over the satellites.

DirecTv believes it will be, at least in some circumstances, a "multichannel video programming distributor" (MVPD) under the 1992 Cable Act. It therefore submits comments on the retransmission consent provisions of the Act, which apply to all MVPDs, not just cable systems. These comments address the retransmission consent provisions as they apply to satellite operators who are MVPDs and, in particular, DirecTv as a DBS operator.^{1/}

The Commission also has requested comment on the MVPD definition in its Notice of Proposed Rule Making in Docket 92-265, "Development of Competition and Diversity in Video Programming Distribution and Carriage," FCC 92-543 (released

1. HCG in its FSS operations does not distribute video programming directly to home viewers, and therefore is not a MVPD under the 1992 Cable Act. See discussion in Section II.

December 24, 1992), in which the Commission considers rules to implement the programming access (Section 19) and program carriage agreements (Section 12) provisions of the 1992 Cable Act. As the Commission noted in the NPRM, the definition of MVPD is critical to many aspects of the 1992 Cable Act. Therefore, DirecTv advocates the adoption of a definition of MVPD that is consistent with the use of that term throughout the Cable Act, and DirecTv intends to supplement these comments as they relate to the MVPD definition in its comments in Docket No. 92-265.

II. DEFINITION OF MVPD UNDER THE 1992 CABLE ACT

A. MVPD is defined in the 1992 Cable Act as:

a person such as, but not limited to, a cable operator, a multichannel, multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming

1992 Cable Act §2(c)(6), 47 U.S.C. §522(12) [emphasis added]. Although the statute clearly contemplates that a "DBS service" should be included in the definition of MVPD, it does not define "DBS service." Significantly, the statute limits the MVPD definition to persons or entities which "make available for purchase" multiple channels of video programming to "subscribers or customers." Thus, it does not appear that the statute intended to include in this definition all DBS licensees, regardless of where they fit in the chain of programming distribution. Instead, MVPDs include only entities that actually sell programming to subscribers or customers. DirecTv therefore supports the Commission's tentative conclusion that the statutory definition of MVPD be interpreted as differentiating between an entity performing a delivery function with respect to the video signal, and an entity that actually sells programming (over its own facilities or by

lease of satellite capacity from another) and interacts with the home viewer. NPRM at ¶ 42.

Under the construct proposed by the Commission in the NPRM, where video programming is sold by a DBS licensee directly to home viewers the DBS licensee would be a MVPD, and therefore subject to the requirement that it obtain retransmission consent before retransmitting any of the broadcast signals covered by the statute.^{2/} As recognized by the Commission, it is likely that, in the DBS market as in the FSS market, video programming will sometimes be sold via a "chain" of service providers, with one entity -- the DBS licensee -- performing a pure transmission service/programming delivery function (without dealing directly with subscribers or consumers of the video programming) and one or more other entities selling programming to subscribers or consumers. The Commission states, "it appears logical that the retransmission consent obligation should fall on the entity directly selling programming and interacting with the public." NPRM at ¶ 42. DirecTv agrees. DirecTv believes the Commission should find, as a matter of law, that MVPDs under the statute include only those entities that sell programming directly to subscribers or consumers, and should exclude entities that merely provide channel capacity for the transmission of video programming that is ultimately sold by others to subscribers.^{3/}

2. As the Commission points out, certain broadcast signals are exempt from the retransmission consent requirement, such as broadcast stations that were "superstations" as of May 1, 1991. See NPRM at ¶¶ 46-47.

3. The Conference Report provides little elucidation of Congressional intent with respect to satellite programming providers, but the plain language of the statute clearly specifies that MVPDs must sell programming to subscribers or customers. It is clear, therefore, that an entity that merely sells bulk transponder capacity to a programmer is not a MVPD.

This distinction is consistent with the Commission's Subscription Video line of decisions, in which it held that a DBS licensee may be involved in the distribution of video programming in a number of different ways, each of which has distinct regulatory consequences. The Commission recognized that a DBS licensee may be (a) a broadcaster, (b) a provider of non-broadcast "subscription video" services, (c) a private carrier (selling or leasing transponder capacity on a long-term, non-common carrier basis) or (d) a common carrier.⁴ In these decisions, the Commission held that, in determining how DBS licensees will be regulated, it is proper to distinguish among DBS licensees on the basis of their relationship with the ultimate consumer of the programming. For example, if the DBS licensee offers programming to the general public without requiring viewers to subscribe, pay a fee, or purchase a decoding device, the licensee could be regulated as a broadcaster. If the licensee offers programming only on an encrypted basis to paying subscribers, the licensee would not be a broadcaster but a provider of subscription video services. If the licensee merely offers transponder capacity to programmer-customers, who in turn provide programming to the public, the licensee would be a transponder seller or common carrier, depending on the terms of the transponder capacity arrangement, and only its programmer-customers would be broadcasters or subscription video providers. Thus, the regulatory status of the DBS

4. See Subscription Video Services, 2 FCC Rcd 1001 (1987) (approving broadcast, common carrier, and non-broadcast, "subscription" modes of operation by DBS licensees), aff'd sub nom. National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988), requests for rehearing and rehearing en banc denied August 31, 1988 and February 16, 1989, affirmed on reconsideration, 4 FCC Rcd. 4948 (1989). In HCG's original DBS application and all subsequent modification applications, HCG has specified that it would operate on a non-common carrier, transponder sale or lease basis. In granting HCG's applications, the Commission approved this mode of operation for a DBS licensee. See Satellite Syndicated Systems, Inc., 99 FCC 2d 1369 (1984); Advanced Communications Corp., 6 FCC Rcd 2269 (1991); United States Satellite Broadcasting Company, Inc., DA 92-1462 (released Oct. 22, 1992).

licensee depends on its place in the programming distribution chain in relation to the ultimate customer, the home viewer.

Consistent with the Subscription Video decisions, the Commission should now hold that DBS licensees and other entities who offer transmission or delivery services to programmers but who do not sell programming directly to home viewers are not MVPDs under the 1992 Cable Act.^{5/} Because such entities are not MVPDs, and are essentially passive with respect to the programming carried over their facilities, they are exempt from the retransmission consent provisions of the 1992 Cable Act.

III. THE RELATIONSHIP BETWEEN THE RETRANSMISSION CONSENT REQUIREMENT UNDER SECTION 6 OF THE 1992 CABLE ACT AND SECTIONS 111 AND 119 OF THE COPYRIGHT ACT

Prior to the adoption of the 1992 Cable Act, satellite service providers could retransmit the signals of non-network broadcast stations without obtaining the permission of or compensating either the broadcaster or the copyright holder, provided that they qualified for either the Section 111(a) "passive carrier" exemption from copyright liability (paying no royalties) or the Section 119 compulsory copyright license (paying royalties to the Copyright Royalty Tribunal in lieu of the copyright holder). See 17 U.S.C. §§ 111(a), 119.

For satellite service providers who are classified as MVPDs, the retransmission consent provisions under Section 6 of the 1992 Cable Act only affect the relationship between the MVPD and the broadcast station licensee whose programming

5. Of course, there should be nothing to prevent a DBS licensee from utilizing a portion of its capacity as a common carrier or non-common carrier facilities provider, and another portion to provide subscription or broadcast video services directly to home viewers. In this situation, the DBS licensee would be a MVPD only with respect to a portion of its capacity.

the MVPD wishes to retransmit -- the statute does not alter the MVPD's relationship with the holder of the copyrights in the programming.

The Act expressly provides that the Section 111 compulsory copyright license for cable systems is not modified by the retransmission consent requirements of Section 6. See 47 U.S.C. §325(b)(6). It follows, and the Commission should clarify, that the Section 111 passive carrier exemption and the Section 119 compulsory copyright license also are unaffected. Specifically, the Commission should clarify that, pursuant to 47 U.S.C. Section 325(b)(6), although broadcasters may withhold consent to the carriage of their signals by DirecTv, the copyright holders are not given any new right to withhold consent; in other words, preexisting copyright law is unchanged by the 1992 Cable Act.

The Commission also has requested comment on "whether it would be correct to interpret Section 325(b)(1)(A) as enabling broadcasters, in the absence of any express contractual arrangement [with the copyright holders], to grant or withhold retransmission consent without authorization from the copyright holders." NPRM at ¶ 65. The answer must be yes, or the statutory language that "nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17," 47 U.S.C. §325(b)(6), would be rendered meaningless. If broadcasters have to obtain the consent of copyright holders before authorizing retransmission of their signals by satellite, the compulsory copyright license under Section 111 would be undermined.

IV. OTHER ASPECTS OF THE NPRM THAT AFFECT SATELLITE MVPDS

The Commission requests comment on whether the retransmission consent requirements of the 1992 Cable Act are intended to apply only to television (as

distinguished from radio) broadcast stations. NPRM at ¶ 43. DirecTv believes that the answer is clear from the statutory instruction that the Commission "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection." 47 U.S.C. § 325(b)(3)(A). Nothing in the statute suggests any Congressional intent to confer a right of retransmission consent on radio broadcasters.

The 1992 Cable Act exempts from the retransmission consent requirement all retransmissions by satellite (to home satellite dishes) of non-network programming that was retransmitted by satellite on May 1, 1991. 47 U.S.C. §325(b)(2)(B). The statute also exempts retransmissions by cable systems and other MVPDs of superstation signals that were superstations on May 1, 1991. 47 U.S.C. §325(b)(2)(D). The Section 325(b)(2)(D) exemption applies to retransmissions by ground-based MVPDs as well as satellite-based MVPDs, whereas the Section 325(b)(2)(B) exemption clearly is limited to satellite-based MVPDs. In the NPRM, the Commission states, "out-of-market retransmissions of television signals that are delivered to a cable system or other MVPD by other means [other than via satellite], such as microwave...are not exempt from retransmission consent requirements." NPRM at ¶ 47. In adopting regulations implementing this portion of the Act, the Commission should clarify although satellite delivery to the MVPD is required under Section 325(b)(2)(D), it is not a requirement for satellite-based MVPDs under Section 325(b)(2)(B). Otherwise, the Commission would read an additional requirement into Section 325(b)(2)(B) -- namely, that satellite MVPDs such as DirecTv must have obtained the television signal via satellite. This is contrary to the plain language of Section 325(b)(2)(B).

Finally, the Commission proposes to clarify that the requirements of Section 614⁶ do not apply to retransmission consent signals. NPRM at ¶¶ 55-56.

DirecTv strongly supports such clarification.


V. CONCLUSION

DirecTv supports the adoption of the rules proposed in the NPRM with the clarifications noted herein.

Respectfully submitted,

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6. They include the channel positioning requirement, the requirement that the complete program schedule be transmitted, the requirement that the signal be provided to all the MVPD's subscribers, and the prohibition on accepting or requesting compensation from broadcast stations in return for carriage. These provisions clearly apply only to must-carry signals.